Filed 2/6/19 P. v. Casillas CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ALBERTO CASILLAS, Defendant and Appellant.	B286467 (Los Angeles County Super. Ct. No. GA101048)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Villalobos, Judge. Affirmed as modified and remanded with directions.

Jenny Brandt, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Alberto Casillas was convicted by jury of kidnapping, injuring a spouse, and criminal threats, arising from an incident with his former girlfriend, Susie R.[1] He raises several challenges on appeal. First, he contends there was insufficient evidence for the jury to find he threatened Susie. Second, he argues that the court erred in admitting expert testimony regarding the cycle of domestic violence, particularly testimony regarding typical behaviors of a batterer. Third, he challenges his consecutive sentence on the criminal threat count, arguing that the court should have stayed that sentence under Penal Code section 654.[2] The parties also submitted supplemental briefing regarding appellant's request that we remand to allow the trial court to exercise its discretion to strike the five-year prior serious felony conviction enhancement.

We agree with appellant that his conduct in threatening Susie was incidental to, and made with the same intent and objective as, the kidnapping. Therefore, the sentence for the threat should have been stayed under section 654. We also conclude that remand is appropriate to allow the trial court to exercise its independent discretion whether to strike the prior serious felony conviction enhancement. We otherwise affirm.

FACTUAL AND PROCEDURAL HISTORY

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[1]Pursuant to California Rules of Court, rule 8.90 (b)(4), we refer to Susie and members of her family by first name to protect their privacy. No disrespect is intended.

[2]All further statutory references herein are to the Penal Code unless otherwise indicated.

A. ***Procedural Background***

An information charged appellant with the following counts: kidnapping (§ 207, subd. (a); count one); injuring a spouse or girlfriend (§ 273.5, subd. (a); count two); and criminal threats (§ 422, subd.(a); count three). The information further alleged that appellant had a prior strike conviction (§§ 667, subd. (d), 1170.12, subd. (b)) and a prior serious felony conviction (§ 667, subd. (a)(1)).

At the conclusion of trial, the jury found defendant guilty of all counts. Appellant stipulated to a court trial on the prior conviction allegations. The court found the prior conviction allegations true. The court also denied appellant's motion to strike the prior strike, a 2010 conviction for criminal threats (§ 422, subd. (a)).

The trial court sentenced appellant to a total term of 16 years and four months in state prison, as follows: the mid-term of five years on count one, doubled due to the prior strike conviction, plus an additional consecutive five-year enhancement due to the prior serious felony conviction; a concurrent term of two years (the low term) on count two, doubled due to the prior strike conviction; and a consecutive term of eight months (one-third the mid-term) on count three, doubled pursuant to the prior strike conviction. Appellant timely appealed.

B. ***Prosecution Case***

Susie and appellant began dating around July 2016. They had broken up prior to the incident on May 3, 2017. At trial, Susie claimed they had gotten back together; however, on the day of the incident she reported that she had broken up with appellant the week before and was attempting to avoid contact with him. At the time of the incident, Susie was at the home of

several members of her family, including her mother and two brothers, Kenneth and Hinaro, in the city of Duarte, in Los Angeles County.

1. *Lee Carter*

Lee Carter, who lives across the street from Susie's family, testified that on May 3, 2017, around 1:30 pm, he was outside watering his plants when he saw a man "beating on" Susie who was "hollering for help." The man was "beating on her arm and on her shoulder trying to put her into a car." Susie was holding onto the door frame and resisting, but the man "beat, and beat" until Susie "finally gave up" and let go of the frame. The man then "grabbed her with both arms around her, pinned both her arms so she could not resist him picking her up and jamming her into the car" in the front passenger seat. He also hit her three or four times on the shoulder. The incident lasted three or four minutes.

After Susie was forced into the car, the man got into the driver's seat and drove away quickly. Carter got a partial license plate from the car and called 911 "because I figured the young lady needed help." From the partial plate, authorities were able to get the full license plate number for appellant's Honda. At trial, Carter identified a photo of the car as the one he saw that day.

Carter was about 50 feet away from the incident. He told the police that the man was Latino, but he had never seen him before and would not be able to identify him.

The 911 call was played for the jury. In it, Carter tells the operator that a guy "kidnapped this lady and she was hollering." He also stated she was "screaming and...then he just grabbed her and slammed her into the car." Later in the call, the operator

asked again whether he could tell the woman was taken against her will. Carter responded, "Oh, hell, yes."

2. *Sheriff's department witnesses*

Deputy Josh Lambert of the Los Angeles Sheriff's Department (LASD) testified that he responded to the Duarte home on May 3, 2017 and spoke with Carter, the neighbor who had called 911. Carter told him he heard a female screaming for help, went out to his porch, and "saw a female being punched in the face several times, screaming for help, screaming 'stop,' and ultimately saw her being forced into a vehicle." Carter said the woman looked terrified. He also said the man grabbed the woman "by the back of her head by the hair and also her pants and forced her into the vehicle."[3]

Lambert also retrieved Susie's cell phone from Kenneth, which Susie had left behind at the Duarte home. Kenneth told Lambert there were voicemails on the phone. Lambert listened to the threatening voicemail message and provided the caller's number to LASD detective Robert Leyva for GPS tracking. Leyva testified that they used the phone number provided by Lambert to get a location for the caller's cell phone through the phone company. The address provided was appellant's residence in East Los Angeles, approximately 18 miles from Susie's family residence in Duarte.

LASD deputy Alicia Marquez arrived at appellant's residence in East Los Angeles on May 3, 2017 in response to the call of a possible kidnapping. She saw appellant and Susie

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[3] At trial, Carter denied seeing the man strike Susie in the face. He also denied seeing the man grab Susie by her hair or pants before forcing her into the vehicle, and said he never told the sheriff's deputies that.

outside his home. She took Susie to her patrol vehicle to question her. Susie at first was "reluctant to say anything," but then admitted she had been dating appellant and had broken up with him the week prior. Marquez asked Susie to give a written statement but Susie refused.

Susie told Marquez she had been avoiding all contact with appellant, but he was "trying to get in contact with her." On May 3, appellant called the landline at the Duarte house; Susie answered the phone but hung up when she realized it was appellant. Appellant arrived at the house shortly thereafter. He began yelling at Susie to open the front door and told her if she did not, he would kick the door in. Susie opened the door and went outside "to avoid any further drama" and appellant blocked her from going back inside. Appellant continued to block her with his body and yelled at her to get into his car, which was parked in front of the home. Susie repeatedly told him she did not want to go with him and yelled at him to stop. Susie told Marquez that appellant pushed her into the car "and she got in and didn't try to get out because she was afraid of what he would do or hurt her so she stayed in the vehicle."

Marquez testified that Susie seemed "shut down" and "defeated" when talking to her, and would "just give bits and pieces and stop talking." Susie's eyes were red and swollen and looked like she had been crying, but she did not say why. Her hair was disheveled, she had a bright red abrasion on her right shoulder and bruises on both thighs "the size of fingertips." Marquez asked Susie how she got the bruises and the shoulder injury and she said she did not know.

Sheriff's deputies arrested appellant without incident. Marquez did not see any injuries on him.

Detective Leyva spoke with Susie in the afternoon on May 3 as he and another detective drove her back to the Duarte house.[4] With traffic, the drive took close to an hour. According to Leyva, Susie initially was reluctant to speak with him, but he began to establish a rapport with her. Susie told him that shortly after she and appellant started dating in July of 2016, she noticed that appellant "had a very short temper, was a very controlling, a jealous type." Leyva asked if she had ever been assaulted, and she mentioned one prior incident where appellant lost his temper and slapped her. She stated she did not report the incident because she feared that he "would do it again."

Susie also told Leyva that she had gone out of town prior to the May 3 incident and had returned to Los Angeles about three weeks ago. She had not told appellant when she was leaving or when she was coming back. While she was gone, appellant consistently called her, causing her to change her cell phone number several times. He also called her house several times in the days before the incident, and once, Susie answered. After appellant recognized her voice, he began a "barrage" of calls because he knew she was home. Susie also mentioned that appellant had threatened that if she did not talk to him or see him, he was going to come to her house.

Susie told Leyva that she was upset that appellant came to the house on May 3, and she did not want to cause any issues with her other family members who were there. Susie reported that when appellant showed up at the house and banged on the door, she tried to wait it out, hoping he would leave. But he told her he was not going to leave and if she did not come out, he would kick the door down. When she went out to talk to him, he

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[4]This interview was not recorded.

began yelling profanities at her and insisted that she get in the car with him. When she refused to get into the car, appellant grabbed her by the hair and body and forced her in. She was afraid he would assault her so she did not get back out of the car.

Susie also told Leyva that as she and appellant were driving on the freeway in appellant's car, her seatbelt was twisted so she manipulated the belt to try to untwist it. As she did so, appellant told her, "if you try to get out, I'm going to kick your ass. I'm going to choke your ass. You're not going to get out of the car." Susie said that she complied because she was afraid he would follow through. When they arrived at appellant's house, they spoke in the car, and Susie convinced appellant that she would continue with their relationship as long as he kept his cool. Leyva testified that he did not see any indication on May 3 that Susie was under the influence of any narcotic.

3. *Kenneth and Alexis*

Kenneth, Susie's brother, testified that when he arrived home on May 3, 2017 the police were already there. He discovered Susie had left her computer open and her phone on the bed. He looked at Susie's phone and dialed the recent number that had called her; appellant answered. Kenneth identified himself and asked for Susie. Appellant said she would call him back. Susie called back from a private number; Kenneth asked if she was coming back and she said, "yeah, in a bit." She sounded like she had been crying.

Alexis R., Hinaro's girlfriend, was also at the Duarte residence that day. Alexis testified that, earlier in the day, she told Susie she was going to the gym, and Susie said to close the door behind her "because she didn't want [appellant] to come." When Alexis returned from the gym, police officers were there.

According to Alexis, previously Susie confided that appellant was threatening her. Susie asked to show Alexis some voicemail messages appellant left, but Alexis wanted to stay out of it. At trial, the prosecution introduced a voicemail left on Susie's phone sometime prior to the date of incident. Alexis identified the caller as appellant. The message included the following: "[Y]ou think you're crazy or what? You think you can fucking quit me like that, Susie? What? Then I would be even fucking like come back. I might [unintelligible] I'm going to show you which fucking, where his head is. All right, I'm going to snatch your ass up."

Alexis spoke with Susie on the phone while Susie was with appellant during the May 3 incident. She asked if Susie was ok, and Susie said she had to go. Alexis asked if she was coming home, and Susie responded, "I'm still going to be here. I'm going to talk to him." Alexis asked where she was and Susie told her she was at appellant's house.

4. *Susie*

Susie testified that she and appellant had resumed their relationship as of May 3, 2017. She claimed that she invited appellant to the Duarte house that day. When he arrived, she came outside. She "tripped and he helped me up." When she tripped, she "probably, just, like, hit my knee somewhere." Susie testified that she voluntarily got in appellant's car and they drove to appellant's house. She denied any yelling by appellant on the drive. When the prosecutor showed Susie a photo from the day of the incident depicting bruising on her thighs, she said that she was anemic and the bruises were caused by carrying boxes when helping her friend move. Shown a photograph of her face, she

said her eyes were puffy because she had been talking to appellant about her children and had been crying.

Susie testified that after she and appellant arrived at his house, Kenneth and Alexis called looking for her. They said the sheriffs had been called and asked if she was ok. She said yes. They also told her that someone had reported a kidnapping and the police were on their way. She thought it was ridiculous and suggested that she and appellant wait outside so the authorities could see it was not true. When they arrived, she told the sheriff's deputies that she was fine and appellant had not kidnapped her.

Susie admitted speaking to a female deputy (Marquez) and then a male detective (Leyva) the day of the incident. But she denied making any incriminating statements about appellant to the law enforcement officers. She acknowledged telling Leyva about a prior incident when a boyfriend slapped her across the face during an argument, but claimed that it was a different ex-boyfriend and suggested that Leyva "got confused." She denied speaking to Leyva about her relationship with appellant.

At the time of trial, Susie was in custody on a pending charge for felony possession of methamphetamines for sale. She also had several prior convictions—for misdemeanor burglary in 2009, felony commercial burglary in 2013, and misdemeanor child abuse in 2012. She testified that she was under the influence of methamphetamine on the day of the incident and that she had disclosed that fact to Marquez.[5]

The prosecutor also played the threatening voicemail for Susie and she acknowledged it was left on her phone sometime

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[5]According to Marquez, Susie did not report that she had ingested any methamphetamine or that she tripped and fell.

prior to the date of incident. Susie testified that she could not identify the caller's voice and claimed appellant had not left her any threatening messages.

5. *Domestic violence expert*

Gail Pincus, executive director of the Domestic Abuse Center, testified as an expert for the prosecution. She explained generally the "cycle of violence" in a domestic violence relationship, based on research done with battered women. She discussed the tactics of power and control used by an abuser to keep an abusive relationship going, including criticism, isolation, economic control, and intimidation. She also discussed the typical pattern of escalating levels of violence over time, with the most extreme level including "use of a weapon, biting, sexual assault rape, and we know that the ultimate is murder." Pincus detailed the way an abuser might move from control to violence, and then to conduct aimed at "hooking the victim back in." She then discussed the typical thoughts and behaviors of the victim in response to each phase of the cycle, including reporting and subsequently recanting. She did not know any of the parties involved in this case.

C. *Defense Case*

Appellant did not present any affirmative evidence.

DISCUSSION

A. *Sufficiency of the Evidence*

Appellant contends there was insufficient evidence for the jury to find that his statements to Susie in the car that "I'm going to kick your ass" and "choke your ass" constituted a threat under section 422. We disagree.

1. *Standard of review*

We review claims challenging the sufficiency of the evidence to uphold a judgment under the substantial evidence standard. Under that standard, we review "the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find [the elements of the crime] beyond a reasonable doubt.'" (*People v. Bolden* (2002) 29 Cal.4th 515, 553, quoting *People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) '"'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'"' (*People v. Bean* (1988) 46 Cal.3d 919, 933, quoting *People v. Hillery* (1965) 62 Cal.2d 692, 702.)

2. *Analysis*

In order to sustain a finding that appellant made a criminal threat in violation of section 422, the prosecution must prove: "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if

there is no intent of actually carrying it out,' (3) that the threat . . . was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228.)

Here, appellant contends the evidence does not support two of the elements of the charge—that the threat must be unequivocal, unconditional, and immediate, and must cause sustained fear. We examine each in turn.

a. *Unequivocal, unconditional, and immediate*

"Section 422 requires that the threat be 'so unequivocal, unconditional, immediate, and specific [that it] convey . . . a gravity of purpose and an immediate prospect of execution of the threat. . . .' It is clear that the nature of the threat cannot be determined only at face value. Section 422 demands that the purported threat be examined 'on its face and under the circumstances in which it was made.'" (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137 (*Ricky T.*), citing *People v. Bolin* (1998) 18 Cal.4th 297, 339-340 (*Bolin*).) "'The use of the word "so" in [section 422] indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim.'" (*Bolin, supra*, 18 Cal.4th at p. 340; *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157.)

"The four qualities are simply the factors to be considered in determining whether a threat, considered together with its surrounding circumstances, conveys those impressions to the victim." (*People v. Stanfield, supra*, 32 Cal.App.4th at pp. 1157–1158.)

Appellant relies on *In re George T.* (2004) 33 Cal.4th 620 (*George T.*) in support of his argument that his threat lacked the degree of unconditionality and immediacy required under section 422. We are not persuaded. In *George T.*, the minor was a 15-year-old student who gave several classmates a poem reading, in part, "For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!!" (*Id.* at p. 624.) The court concluded that the poem was "ambiguous and plainly equivocal" as it did not state a plan by the minor to kill students and therefore did not "constitute an actual threat to kill or inflict harm." (*Id.* at p. 636.) Moreover, there were no surrounding circumstances, such as a history of animosity or conflict between the minor and the other students, that would add context to the statements. (*Id.* at p. 637.)

Here, on the other hand, appellant threatened that he would kick and choke Susie if she tried to get out of the car. There was evidence that he made this threat immediately upon observing Susie adjusting her seatbelt, and following a struggle in which he forcibly put her into the car after she resisted. This was sufficient evidence to establish that the threat was both unambiguous and immediate.

Moreover, the fact that the threat was conditional does not, alone, place it outside the scope of section 422. "[T]hreats often have by their very nature some aspect of conditionality: A threat is made to convince the victim to do something 'or else.'" (*People*

v. Melhado (1998) 60 Cal.App.4th 1529, 1538; see also *Bolin, supra*, 18 Cal.4th at p. 339 ["the reference to an 'unconditional' threat in section 422 is not absolute"]; *People v. Brooks* (1994) 26 Cal.App.4th 142, 149 [conditional threats are true threats if their context reasonably conveys to victims that they are intended].) Instead, courts must look to the "effect the threatening words have on the victim," and the "degree of seriousness and imminence which is understood by the victim to be attached to the future prospect of the threat being carried out, should the conditions not be met." (*People v. Melhado, supra*, 60 Cal.App.4th at p. 1538.) In this instance, we conclude the definition was met, given Susie's prior statements indicating her fear of appellant and her belief he would carry out his threats, coupled with evidence of the prior history of appellant's temper, violence, and threats toward Susie. (See, e.g., *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431–1432 [defendant had a history of threatening and assaulting victim].)

We also reject appellant's suggestion that the threat could not have realistically been carried out because it was "too impractical" to believe Susie would attempt to exit the car on the freeway. There was evidence that Susie complied with appellant's threat, not because of impracticality, but because she was afraid. Moreover, based on Leyva's testimony that it took an hour in traffic to travel 18 miles on the return trip later that afternoon, the jury could have inferred that the traffic was moving slowly enough to allow a reasonable possibility that Susie could try to get out, either on the freeway or on a surface street.

b. *Sustained fear*

Section 422 also requires that the threat cause the threatened person "reasonably to be in sustained fear for his or

her own safety." Courts have defined the term "sustained fear" as a period of time "that extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 & fn. 6 (*Allen*) ["no minimum time period is required, only a period 'not insubstantial'"]; see also *Ricky T., supra*, 87 Cal.App.4th at p. 1140.)

For example, in *Allen, supra*, 33 Cal.App.4th at p. 1156, the court found that "[f]ifteen minutes of fear of a defendant who is armed, mobile, and at large, and who has threatened to kill the victim and her daughter, is more than sufficient to constitute 'sustained' fear for purposes of this element of section 422." The court also found the victim's knowledge of the defendant's prior conduct was relevant to establish a state of sustained fear. (*Ibid.*) On the other hand, the court in *Ricky T., supra*, 87 Cal.App.4th at p. 1140, found there was no evidence of a sustained fear. There, a 16-year-old student became angry when his teacher accidentally hit him with a classroom door. (*Id.* at p. 1135.) The student told the teacher he was going to "get" him or "kick [his] ass." The teacher felt threatened and sent the student to the school office. (*Id.* at pp. 1135–1136.) The court found the teacher's fear insufficient in the absence of evidence showing he felt fear beyond the momentary angry utterances. (*Id.* at p. 1140.) It observed that the police were not called about the incident until the following day, there was no history of disagreements between the student and the teacher, and the student complied with the teacher's demand to go to the office. (*Id.* at pp. 1138-1140.) The court thus concluded that the student's "statement was an emotional response to an accident rather than a death threat that induced sustained fear." (*Id.* at p. 1141.)

Here, appellant claims there is no evidence that Susie's fear lasted beyond the moment he told her he would "kick [her] ass" and "choke [her] ass" if she tried to get out of the car. This ignores the evidence of all of the circumstances surrounding appellant's threat. Susie told Leyva that she stayed in the car after appellant threatened her because she was scared he would follow through on the threat. She did not attempt to exit the car at any point on the 18-mile ride with appellant, nor did she do so once they arrived at his house until she had convinced appellant they could stay together. Moreover, although Susie recanted her statements at trial, there was evidence by several other witnesses that she had told them she was afraid of appellant, that he had made prior threatening statements to her, and had struck her on a prior occasion, which she did not report because she feared he would do it again. Under those circumstances, there was sufficient evidence for the jury to conclude that appellant's threat induced a reasonable fear in Susie that was more than fleeting, and kept her from trying to leave the car for a sustained period of time.

Appellant's citation to *In re Sylvester C.* (2006) 137 Cal.App.4th 601 is inapposite. There, as part of an altercation in a parking lot in which he threatened several people, the defendant approached an attendant and told him, "'I am going to come and get you and I am going to kill you.'" (*Id*. at p. 604.) The attendant did not testify, thus, the *only* evidence offered by the prosecution to show a subjective fear in response to the threats was testimony by another victim (who received a separate threat) that "Everybody got scared." (*Id*. at p. 606.) The court concluded that testimony was insufficient to establish that the attendant actually suffered sustained fear. (*Ibid*.)

Accordingly, we conclude that there was sufficient evidence to support appellant's conviction for criminal threats under section 422.

B. *Expert testimony on domestic violence*

Appellant argues that the trial court erred in admitting the bulk of Pincus's testimony on domestic violence, as it was irrelevant and highly inflammatory. We find no error.

1. *Background*

Before trial, the court held a hearing on the admission of expert testimony by Pincus. The prosecutor explained that she sought to have Pincus testify "to assist the trier of fact in understanding what the cycle of violence is" in domestic violence cases. Defense counsel argued that first, there was no foundation that any of Pincus's testimony was relevant to this case, and second, in past trials, Pincus would testify at length about how a batterer typically acted, rather than focusing on explaining why the victim might recant. The court tentatively ruled that the testimony was relevant and "would be something that most jurors would not be familiar with as far the alleged cycle of violence," but allowed the parties to revisit the issue during trial.

The court held another hearing on the issue mid-trial. Defense counsel requested that the expert's testimony be limited "to the beliefs and behaviors of complaining witnesses" and not include "batterer profile" evidence. She also asked for a limiting instruction. She argued that the testimony should be focused on explaining why a victim would recant, "and not what a batterer looks like and how a batterer charms and wines and dine[s] a person. All of that is irrelevant, prejudicial." The court responded it did not "think you can separate the two. It seems to me that they are related when you're talking about the victims of

domestic violence. And it would seem to me that you're also talking about certain profiles of persons who allegedly commit those types of offenses as well. So I don't know how that [is] not relevant." The court continued, "I don't think you can really talk about the effect on the victims without . . . talking about how that comes about. And part of that is discussing the alleged batterer in that situation." But the court noted it would hear further objections about specific questions that might go "beyond the scope of [section] 1107."

During Pincus's testimony, the court sustained a defense objection and ordered testimony stricken regarding an abuser's tendency to use pornography. It overruled one other objection by defense counsel as to scope.

At the conclusion of the trial, the jury was instructed that "Gail Pincus's testimony about battered women's syndrome is not evidence that the defendant committed any of the crimes charged against him. You may consider this evidence only in deciding whether or not Susie R.'s conduct was not inconsistent with the conduct of someone who has been abused, and in evaluating the believability of her testimony."

2. *Legal standards*

In general, "'[a] trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Brown* (2003) 31 Cal.4th 518, 534.)

As our Supreme Court explained, "the prosecution of domestic violence cases presents particular difficulties. 'Unlike conventional cases . . . where prosecutors rely on the cooperation

and participation of complaining witnesses to obtain convictions, in domestic violence cases prosecutors are often faced with exceptional challenges. Such challenges include victims who refuse to testify, who recant previous statements, or whose credibility is attacked by defense questions on why they remained in a battering relationship.'" (*People v. Brown* (2004) 33 Cal.4th 892, 899 (*Brown*).)

Expert testimony on domestic violence and "intimate partner battering"[6] is admissible under Evidence Code sections 801 and 1107. Evidence Code section 801, subdivision (a), permits the introduction of testimony by a qualified expert when that testimony may "assist the trier of fact." Evidence Code section 1107, subdivision (a), provides: "In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge." Subdivision (b) provides: "The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness."

"Accordingly, a properly qualified expert may testify to [intimate partner battering] when it is relevant to a contested

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[6]Historically, Evidence Code section 1107 and related cases used the term "battered women's syndrome." However, domestic violence experts have long criticized the term, and it was changed in the statute in 2005 to "intimate partner battering and its effects." (See Evid. Code, § 1107, subds. (e) & (f).)

issue at trial other than whether a criminal defendant committed charged acts of domestic violence." (*People v. Gadlin* (2000) 78 Cal.App.4th 587, 592 (*Gadlin*).) Evidence is admissible when it pertains to the "cycle of violence" in an abusive domestic relationship and the "tendency of domestic violence victims to recant previous allegations of abuse as part of the particular behavior patterns commonly observed in abusive relationships," even when there is no history of domestic violence, as long as there is independent evidence of domestic violence in the relationship. (*Brown, supra*, 33 Cal.4th at pp. 907-908.)

3. *Analysis*

Appellant contends that the "majority of Ms. Pincus' testimony was irrelevant" because there was insufficient evidence to establish that appellant "matched the profile of an abuser." He points out various characteristics of a typical abuser, as described by Pincus, and asserts there was no evidence he matched any of them. This argument misses the point. Evidence regarding the cycle of violence in a domestic violence relationship is admissible when there is "some independent evidence of domestic violence" in the relationship. (*Brown, supra*, 33 Cal.4th at p. 908.) There is no requirement that appellant match all of the characteristics of a typical abuser in order for this testimony to be relevant and admissible under Evidence Code section 1107.

We find *Brown, supra*, 33 Cal.4th at p. 907 instructive. There, an expert witness "described the tendency of domestic violence victims to recant previous allegations of abuse as part of the particular behavior patterns commonly observed in abusive relationships." The expert further explained the "'cycle of violence,'" including that "[m]ost abusive relationships begin with a struggle for power and control between the abuser and the

victim that later escalates to physical abuse. . . . Often the abuser uses psychological, emotional, or verbal abuse to control the victim. When the victim tries to leave or to assert control over the situation, the abuser may turn to violence as an attempt to maintain control." (*Ibid*.) The defendant argued that the testimony was irrelevant, as there was no evidence of prior incidents of domestic violence in his relationship with the victim. The court disagreed, finding it sufficient that the "evidence presented at trial suggested the possibility that defendant and [the victim] were in a 'cycle of violence' of the type described by" the expert. (*Ibid*.) As such, the expert testimony was relevant to the victim's credibility and to help the jury understand why she might recant. (*Id*. at pp. 907-908.)

Here, appellant's argument ignores all of the evidence supporting the existence of a domestic violence relationship between appellant and Susie. There was evidence that appellant struck Susie on at least one prior occasion, and that she was afraid of him; and there was testimony from multiple witnesses regarding appellant's physical violence toward Susie on the day of the incident. Susie reported that appellant was controlling and had a bad temper; there was additional evidence of appellant's controlling and angry conduct in the voicemail message left by appellant and the testimony that he would repeatedly call Susie, threaten her, and appear at her home in an intimidating manner after she had broken up with him. This evidence was more than sufficient to establish the presence of domestic violence in the relationship between appellant and Susie. Accordingly, the expert testimony regarding the cycle of violence was relevant to the crucial issue of Susie's credibility and the reasons she might recant her prior statements.

Appellant also challenges the scope of the testimony regarding the cycle of violence. He asserts that Pincus's testimony largely focused on inflammatory information regarding a typical abuser, rather than explaining why a victim might recant. He argues that the testimony related to abusers was therefore irrelevant to any contested issue; instead, he contends it constituted improper profile evidence.

The trial court found that the testimony regarding a typical abuser was a necessary part of understanding the victim's responses to that abuse, and therefore part of the relevant discussion of the cycle of violence. We find no abuse of discretion in that conclusion.

Our sister court reached a similar conclusion with respect to the same expert in *Gadlin, supra,* 78 Cal.App.4th at p. 595. There, Pincus testified as an expert concerning the "three-phase cycle of violence that typically occurs in battering relationships," including an explanation of the effect of typical abuser behaviors on the victim. (*Id*. at p. 591) The defendant repeatedly objected to the scope of the expert's testimony, arguing that it included testimony offered "against a criminal defendant to prove the occurrence of the act or acts of abuse" and was therefore outside the limits of Evidence Code 1107. In response to defendant's objections, the trial court "cautioned the jury that the testimony about abuser behavior was not based on the facts of the present case," and subsequently "responded to two further objections by ordering the prosecutor to complete the general testimony and focus on the behavior of battered victims." (*Id*. at p. 595)

On appeal, the court found the admission of Pincus's testimony was not an abuse of discretion. The court reasoned, "While it is true that [intimate partner battering] testimony can

be powerfully prejudicial when its legal bounds are exceeded [citation], we find no abuse of discretion in the trial court's present rulings. When [intimate partner battering] testimony is properly admitted, testimony about the hypothetical abuser and hypothetical victim is needed for [intimate partner battering] to be understood. To the extent that the expert testimony suggests hypothetical abuse that is worse than the case at trial, it may even work to the defendant's advantage. In any event, limiting the testimony to the victim's state of mind without some explanation of the types of behaviors that trigger [intimate partner battering] could easily defeat the purpose for which the expert is called, which is to explain the victim's actions in light of the abusive conduct." (*Ibid.*)

The trial court applied the same reasoning here. The court overruled appellant's objection to the entirety of Pincus's testimony, explaining that a discussion of the full cycle of violence, including the behavior and mindset of the typical abuser, was necessary to help the jury understand the victim's actions. The court also left the door open for appellant's counsel to object to specific areas of testimony she felt exceeded the scope of Evidence Code section 1107. Appellant's counsel did so on several occasions, and the court sustained one such objection and ordered that testimony stricken. To the extent that appellant's counsel failed to object to other specific questions or topics broached by Pincus, those objections are forfeited. (See *People v. Stevens* (2015) 62 Cal.4th 325, 333 ["the failure to object to the admission of expert testimony or hearsay at trial forfeits an appellate claim that such evidence was improperly admitted"].)

We are also unpersuaded by appellant's citation to cases outside the domestic violence context in support of his contention

that the expert testimony constituted improper profile evidence. These cases do not examine the admission of evidence pursuant to Evidence Code section 1107 and are otherwise inapplicable. For example, in *People v. Robbie* (2001) 92 Cal.App.4th 1075, 1077, the defendant was convicted of kidnapping for sexual purposes, oral copulation, and penetration with a foreign object. The prosecution sought to admit expert testimony to show that the comments the defendant made to the victim throughout the course of the incident and afterward "are consistent with a certain type of rapist." (*Id*. at 1081) The court allowed the evidence. Although the expert was never directly asked to opine whether the defendant was a sex offender, the prosecutor incorporated the victim's description of the defendant's conduct into hypothetical questions. In response, the expert testified "that the behavior set out in the prosecutor's questions was typical of a particular kind of criminal," and described defendant's conduct as the "most prevalent type of behavior that I've seen with sex offenders." (*Id*. at p. 1084.) The court concluded that this testimony "constituted improper profile evidence." (*Ibid*.)

Here, by contrast, Pincus testified generally regarding typical behavior patterns in domestic violence relationships and was not asked to opine using hypotheticals matching the facts of this case. She acknowledged that she did not know the facts of the case or any of the parties, and she offered no opinions about them. The prosecutor in closing focused on how the expert's testimony helped to explain Susie's actions; she did not argue that appellant fit the profile of an abuser based on Pincus's discussion. In addition, the trial court specifically instructed the jury as to the limited purpose for which they could consider

Pincus's testimony—as relevant to Susie's credibility and conduct. We presume the jury followed that instruction. (See *People v. Avila* (2006) 38 Cal.4th 491, 574.)

In sum, we find no abuse of discretion in the trial court's admission of Pincus's testimony on intimate partner battering.[7]

C. *Section 654*

Appellant argues that the counts for kidnapping (count one) and threats (count three) alleged a single course of conduct with a single objective, and therefore that the court should have stayed the sentence on count three under section 654. We agree.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." It "precludes multiple punishments for a single act or indivisible course of conduct." (*People v. Hester* (2000) 22 Cal.4th 290, 294.) The defendant's intent and objective, not the temporal proximity of his or her offenses, determine whether multiple offenses constitute an indivisible course of conduct. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) A defendant who acts pursuant to a single objective may be found to have harbored a single intent and therefore may be punished only once. (*Ibid.*) If, on the other

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[7] Likewise, we reject appellant's assertion that the expert testimony violated his due process rights and rendered the trial fundamentally unfair. (See *People v. Roybal* (1998) 19 Cal. 4th 481, 506, fn. 2 ["The superior court did not abuse its discretion; there is thus no predicate error on which to base the constitutional claims."]; *People v. Davis* (1995) 10 Cal.4th 481, 506, fn. 2 [no constitutional violation where defendant "recasts his state claim under constitutional labels"].)

hand, defendant harbored "multiple criminal objectives," which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, "even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639, disapproved on other grounds by *People v. Mendoza* (2000) 23 Cal.4th 896.)

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; see also *People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) "If the court makes no express findings on the issue, as happened here, a finding that the crimes were divisible is implicit in the judgment and must be upheld if supported by substantial evidence. [Citation.] Thus, '[w]e review the trial court's findings "in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence."'" (*People v. Lopez* (2011) 198 Cal.App.4th 698, 717.)

Here, the threat and the kidnapping were part of a single course of conduct. Indeed, appellant threatened Susie *during* the kidnapping; moreover, given the nature of the threat—to keep Susie in the car—the evidence establishes that it was made in furtherance of appellant's kidnapping objective.

Respondent argues that even if appellant harbored the same intent and objective for both acts, the threat was an instance in which "the means to achieve an objective may become so extreme they can no longer be termed 'incidental' and must be

considered to express a different and a more sinister goal than mere successful commission of the original crime." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191.) The Attorney General does not offer an explanation why this exception would apply in this case. We find it inapplicable. *People v. Nguyen, supra*, 204 Cal.App.3d at 190, discussed cases where "gratuitous violence against a helpless and unresisting victim . . . has traditionally been viewed as not 'incidental' to robbery for purposes of" section 654. (See *ibid*. [attempted murder during robbery separately punishable where robber forced victim to lie down, and then shot him]; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271–272 [where robber "repeatedly hit his 66-year-old feeble, unresisting victim on the head and body with a two-by-four board" until he was unconscious, the amount of force was "far more than necessary to achieve" the objective of the robbery]; *People v. Cardenas* (1982) 31 Cal.3d 897 [robber shot one victim in the back for no apparent reason while another victim opened safe].) Appellant's threat here does not rise to the level of gratuitous violence such that it was no longer incidental to the kidnapping.

Thus, substantial evidence does not support an implied finding that appellant harbored different objectives in committing the kidnapping and then threatening Susie. The sentence on count three must be stayed.

D. *Remand for resentencing*

Appellant requests that we remand the matter for resentencing pursuant to section 667, subdivision (a) (667(a)).[8] Appellant was sentenced to a consecutive five-year term on count

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[8]The parties did not raise this issue in their briefs on appeal. However, we granted appellant's request for supplemental briefing.

one under section 667(a) for his prior serious felony conviction. At the time of his sentencing, the trial court was required to impose this term under section 667(a). On September 30, 2018, while this appeal was pending, the Governor signed Senate Bill No. 1393 (2017-2018 Reg. Sess.) (S.B. 1393), amending sections 667(a) and 1385 to provide the trial court with discretion to strike enhancements for serious felony convictions. The legislative changes became effective January 1, 2019. S.B. 1393 applies to all cases not yet final as of the statute's effective date. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 972.) The amendment therefore applies to this case.

Appellant contends remand is required to allow the trial court to exercise its discretion whether to strike the section 667(a) enhancement. In the analogous situation involving the enactment of S.B. 620, which gave the trial court discretion to strike firearm enhancements under section 12022.5 and 12022.53, courts have held that a remand to allow the trial court to exercise that discretion "is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; see also *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426-428; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.)

The Attorney General argues that remand is unnecessary because the record clearly indicates that the trial court would not have exercised its discretion to strike the prior conviction. As the Attorney General notes, the record contains some indication that

the trial court *might* have imposed the section 667(a) enhancement regardless of discretion. The court denied appellant's motion to strike his prior strike conviction in the interest of justice, which doubled appellant's sentence on count one. The court also noted at the sentencing hearing that appellant had a "tendency to be violent, especially with women," and that appellant's conduct related to the current offenses was "very violent."

However, there are other indicators suggesting that the court did not intend to impose the maximum sentence possible on appellant. Notably, the court imposed a concurrent, rather than a consecutive, sentence on count two, and chose the low or mid-term sentence on each of the three counts. The court also noted several mitigating factors, including that Susie was not seriously harmed and that appellant appeared to have a drug problem, which he recognized and which may have contributed to the offense.

The trial court did not expressly state whether it would have exercised discretion to strike the prior serious felony conviction enhancement. We cannot conclude that the remaining record in this case provides a clear indication that the court would have declined to exercise such discretion. (Compare *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427 [remanding where court "expressed no intent to impose the maximum sentence" and struck four prior convictions] with *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand where trial court imposed high term, consecutive sentence, and two discretionary enhancements, and indicated defendant was "the kind of individual the law was intended to keep off the street as long as possible"]; see also *People v. Almanza*, *supra*, 24 Cal.App.5th at

pp. 1109-1110 [remanding despite trial court's imposition of consecutive rather than concurrent sentences].) We express no opinion on how the court should exercise its discretion on remand, as that discretion is for the trial court to exercise in the first instance.

DISPOSITION

The convictions are affirmed. The judgment is modified to stay the term imposed on count three for making a criminal threat (§ 422) pursuant to section 654. We also remand the case with directions to the superior court to exercise its discretion to strike the prior prison term pursuant to section 667(a). If the court elects to exercise this discretion, appellant shall be resentenced. At the remand hearing, appellant has the right to the assistance of counsel and, unless he chooses to waive it, the right to be present. We order the clerk of the superior court to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.